Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

ORION A. RUST, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the military judge erred to the prejudice of the petitioner by admitting the testimony of Captain Carranza and Prosecution Exhibit 5, privileged attorney-client matters, without petitioner's consent.

Whether the military judge erred, to the prejudice of the petitioner when he denied petitioner's motion to suppress petitioner's statements to Captain Carranza and petitioner's written notes which were part of a quality assurance record and therefore should not have been admitted at his court-martial.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Orion A. Rust, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Armed Forces entered in his case on April 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 41 MJ 472 (1995) (Appendix A). The unpublished opinion of the United States Air Force Court of Military Review, issued on August 24, 1993 is attached (Appendix B).

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 6 April 1995. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

STATEMENT OF THE CASE

The petitioner, a military doctor, was convicted of dereliction in the performance of his military duties by willfully failing to report to the Castle Air Force Base Emergency Room when purportedly required to do so; failing to examine a patient, Ms. S when notified by a civilian contract physician, Dr. Canga, that she was in distress; and failing to provide proper medical care to Ms. S as it was his duty to do. He was also convicted of making a false statement to the Castle Air Force Base claims officer, Captain Carranza, in January of 1991, concerning these latter incidents.

In early January 1991, Capt. Carranza travelled to and sought out petitioner in his office. He introduced himself as the Castle Air Force Base Hospital's lawyer who would assist petitioner should he be sued under the Federal Tort Claims Act (FTCA). He did not advise petitioner that any statements he made could be used against him in a subsequent court-martial.

The false official statement charge centered around comments allegedly made by the petitioner to Captain Carranza during this interview/conversation, that is, that petitioner told Ms. S. that he wanted to admit her to the hospital, but that she refused to be admitted.

At trial, petitioner moved to suppress his statements to Captain Carranza on the basis that their mutual communications were protected by the attorney-client privilege and therefore could not be disclosed absent petitioner's consent or waiver. In the alternative, petitioner's position was that these

statements were protected from disclosure as a quality assurance record. The military judge denied the defense motions and admitted the content of these communications in the form of testimony by Capt. Carranza and his authentication of petitioner's written notes (Prosecution Exhibit 5).

REASONS FOR GRANTING THE WRIT

I. THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF THE PETITIONER, BY ADMITTING THE TESTIMONY OF CAPTAIN CARRANZA AND PROSECUTION EXHIBIT 5, PRIVILEGED ATTORNEY-CLIENT MATTERS, WITHOUT PETITIONER'S CONSENT

The military judge erred in admitting the testimony of Captain Carranza concerning what petitioner told him and further erred by admitting Prosecution Exhibit 5, petitioner's notes as written; all written and verbal communications between petitioner and Captain Carranza were privileged. As noted *supra*, Captain Carranza, when he sought out petitioner, advised petitioner that he was an attorney who would assist him in specific legal matters should he be sued under the FTCA, to include having the case removed from state to federal court, the substitution of the United States as a party defendant in the event of an action brought under the FTCA, and the investigation of the underlying circumstances surrounding any potential failure by petitioner to meet the standard of care. R. 92-95.

With the information and explanation provided to him by Captain Carranza, petitioner was under the justifiable, good faith belief that he was consulting with a lawyer with a view toward obtaining legal services and, consequently, he communicated confidential information to Captain Carranza while under this belief. *See* petitioner's exhibit 1, Affidavit of peti-

tioner dated 21 September 1992 at p. 4-5. Petitioner reasonably believed that Captain Carranza was his attorney, representing his interests, and he was not given any indication to the contrary. During their conversation, no effort was made by Captain Carranza to inform petitioner that he was not petitioner's counsel. Captain Carranza did not inform petitioner that he was not petitioner's counsel. Captain Carranza did not inform petitioner that there was no attorney-client relationship between them (R. 97), and during the Article 32 investigation, he testified that he assumed petitioner believed him to be his attorney. R. 96.

Military Rule of Evidence 502 provides that "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. . ." Military Rule of Evidence 502(b)(1) defines a "client" as "a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer." The party invoking the attorney-client privilege has the burden of proving that the lawyer-client relationship existed and that the communications in question were confidential. *United States v. Schaltenbrand,* 930 F.2d 1554, 1562 (11th Cir. 1991). To be protected by the privilege, the communication must be made to the lawyer confidentially, in his professional capacity, for the purpose of securing legal advice or assistance. *Id.* The pivotal question is whether the client reasonably understood the exchange to be confidential. *Kevlik v. Goldstein,* 724 F.2d 844, 849 (1st Cir. 1984). The fact that an attorney may have instructions from superiors as to the scope of his representation during that relationship does not remove the fact of the confidential relationship nor does it in any way prevent the

establishment of the relationship if the individual has a reasonable belief that what he says to the legal adviser is disclosed in confidence. *United States v. Hustwit,* 33 M.J. 608 (NMCMR 1991).

Whether a lawyer-client relationship exists when a communication has been made to an attorney is a question of fact. *United States v. Gandy,* 9 USCMA 355, 361, 26 CMR 135, 141 (1958); *United States v. Costanzo,* 625 F.2d 465 (3d Cir. 1980). In making the final determination as to whether the communication in question was privileged, the military judge should resolve any doubt in favor of the accused. *Gandy, supra.* The United States Court of Appeals for the First Circuit agrees with the proposition that the client's reasonable understanding is paramount in determining whether or not a given communication was privileged. *United States v. Bay State Ambulance and Hospital Rental Service, Inc,* 874 F.2d 20 (1st Cir. 1989).

In this case, it is clear that, based upon the evidence submitted to the military judge, to include Captain Carranza's own admissions that he told petitioner he would be working on petitioner's behalf during their initial consultation (R. 94-5), the military judge's ruling that the exchange between petitioner and Captain Carranza was not privileged was clearly erroneous and contrary to established precedent and public policy.

II. THE MILITARY JUDGE ERRED, TO THE PREJUDICE OF THE PETITIONER, WHEN HE DENIED PETITIONER'S MOTION TO SUPPRESS PETITIONER'S STATEMENTS TO CAPTAIN CARRANZA AND PETITIONER'S WRITTEN NOTES WHICH WERE PART OF A QUALITY ASSURANCE RECORD AND THEREFORE SHOULD NOT HAVE BEEN ADMITTED AT HIS COURT-MARTIAL

Petitioner's statements to Captain Carranza, more fully described above, were part of a medical quality assurance record as defined by 10 U.S.C. 1102(i)(2) and as such were privileged and should only have been disclosed, if at all, upon proper written request by the petitioner. Consequently, the trial judge erred as a matter of law by denying the defense motion to suppress these statements.

The privilege established by section 1102 extends to records as well as to testimony by those involved in a quality assurance program, barring disclosure except in certain limited circumstances. *In re United States,* 864 F.2d at 1154; *see also* 10 U.S.C. 1102(c) (listing exceptions). The Congress established a prohibition against the use of quality assurance records unless certain precise statutory requirements are met. While there is no bar to prosecution envisioned by the statute, records may only be produced at trial pursuant to the statutory scheme. Exception (c)(F) of 1102 is applicable to the instant case:

> (c) . . . [A] medical quality assurance record . . . may be disclosed . . . and a person . . . may give testimony only as follows:
>
> (f) . . . To a criminal or civil law enforcement agency or instrumentality . . . if a qualified representative of such agency or instrumentality makes a *written request* that such record or testimony be provided for a purpose authorized by law.

10 U.S.C. 1102(c)(F) (emphasis added). No such written request was ever made. Because the trial judge incorrectly determined that petitioner's statements to Capt. Carranza were not part of a medical quality assurance record, R. 91, he never considered the fact that the Government had not complied with the precise requirements of section 1102. By admitting the statements that Dr. Rust made to Captain Carranza, he erred as a matter of law.

Recognizing the importance of medical quality assurance programs as a means of monitoring and ensuring that quality medical care is provided to Department of Defense beneficiaries, Congress enacted 10 U.S.C. 1102 to guarantee the confidentiality of records and communications prepared as part of a quality assurance program. *In re United States,* 864 F.2d 1153 (5th Cir.) *reh'g denied,* 869 F.2d 1487 (5th Cir. 1989). As with attorney-client discussions, quality assurance assessments require absolute candor and openness by those providing information or rendering opinions, often possible only when an individual is secure in the knowledge that his statements are made "in an environment of confidentiality." *Id.*

The circumstances of obtaining of petitioner's oral and written statements in early January 1991 demonstrate that they were taken by Capt. Carranza in his official capacity as a quality assurance claims officer as part of a quality assurance investigation. At the initial Article 39(a) session, Captain Carranza testified that he initiated contact with petitioner when he was told in late December 1990 by the outprocessing claims officer, that he should "get on the case," (R. 60) to "investigate . . . a possible potential claim under the Federal Tort Claims Act." R. 61. Prior to speaking with petitioner, Captain Carranza followed the advice of Captain Whitmore, and began "pulling together the files" to start an investigation. R. 61. Captain Carranza then went to speak with petitioner.

At trial, Captain Carranza testified that his conversations with petitioner were part of a quality assurance program. Captain Carranza asked petitioner for a copy of petitioner's written notes. R. 459. He further testified that he took the notes in his official capacity as the claims officer investigating the potential medical malpractice claim, and that he was "going to put it in [his] report." R. 460. Captain Carranza's meeting with petitioner and the taking his oral and written statements were thus part of a quality assurance investigation already under way and the statements became part of the quality assurance record.

Based on the facts as presented in Capt. Carranza's testimony both at the Article 39(a) session and a trial, it is clear that petitioner's statements were part of a "medical quality assurance record." The quality assurance program includes any activity carried out to assess the quality of medical care, including risk management. *See* 10 U.S.C. 1102(j)(1). Further, subsection (j)(2) contains no requirement that a statement be solicited by an investigator to qualify as part of a quality assurance record. As long as the statement is part of the "proceedings, record, minutes, and reports that emanate from quality assurance program activities," is considered part of the record. *Id.* at 1102(j)(2).

Not only did Captain Carranza request a copy of petitioner's notes while acting in his official capacity, he explained that they would be included in a further review process. At the time of this request, Captain Carranza was concerned primarily with risk management and reducing the exposure of the hospital and the Government to a claim under the Federal Tort Claims Act. This is exactly the type of situation envisioned by Congress to require the candor and truthfulness fostered by confidentiality. Because petitioner's statements were privileged statutorily and no written request for disclosure was made in accordance with the statute, the statement were improperly admitted into evidence and cannot, therefore support a conviction for making a false official statement.

CONCLUSION

The questions presented are genuinely important and affect not only petitioner, but the rights of countless medical practitioners, both in the military and in the civilian communities. The military judge clearly abused his discretion with regard to his determination concerning the existence of an attorney-client relationship and the applicability of 10 U.S.C. 1102 to the case at bar. The petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari and remand to the United States Court of Appeals for further consideration.

Respectfully submitted,

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